In Supreme Court of the United States.

IN EQUITY.

No. 409.

WILLIAM C. FITTS,
As Attorney-General of the State of Alabama;
A. H. CARMICHAEL,
As Solicitor of the Eleventh Judicial Circuit of the State of Alabama; and
WILLIAM H. GILLIAM,
Appellants.

versus

CHAS. M. McGHEE AND HENRY FINK,
As Receivers of the Memphis and Charleston Railroad, and The Memphis and Charleston Railroad Company.

BRIEF FOR THE APPELLANTS.

The Florence Bridge Company was chartered to build and operate a toll bridge over the Tennessee River at Florence, by an act of the General Assembly of Alabama, approved January 12, 1832. Said charter is in words and figures as follows:

"AN ACT

To incorporate the Florence Bridge Company.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened,* That the persons who may be-

come stockholders in the Florence Bridge Company, according to the provisions of this act, be and they are hereby created a body politic and corporate, by the name and style of the president, directors and company of the Florence Bridge Company, with power to hold real and personal estate, to sue and be sued, plead and be impleaded in any court of law and equity; to have and employ a common seal and to alter the same at pleasure; to make, amend and repeal all necessary and proper by-laws for the government of said corporation not inconsistent with the laws and constitution of this State.

SEC. 2. *And be it further enacted*, That the stock of said corporation shall be divided into shares of one hundred dollars each, and when there shall be subscribed the sum of sixty thousand dollars, the owners of the ferry across the Tennessee river at said town of Florence, shall be permitted to subscribe their respective shares or interests in said ferry or ferry landings, at the rate of thirty-five thousand dollars for the whole; and the interest so subscribed shall become a part of the capital and joint stock of said corporation; and when the whole interest in said ferry and landings shall be subscribed or condemned, according to the provisions of this act, the said corporation shall be vested with the whole title thereof, both in law and equity, to be held by them and their heirs and successors forever, upon the completion of the bridge according to this act.

SEC. 3. *And be it further enacted*, That John J. Winston, Abram D. Hunt and John McKinley, be and they are hereby appointed commissioners to re-

ceive subscriptions for the purpose of erecting a bridge across the Tennessee river at the said town of Florence, whose duty it shall be to open books for the subscription of stock, at the Eagle hotel in said town of Florence, on the 3rd Monday in April, 1832, and to keep said books open until the sum of sixty thousand dollars shall be subscribed.

SEC. 4. *And be it further enacted*, That when the sum of sixty thousand dollars shall be subscribed, exclusive of said ferry, it shall be the duty of said commissioners to call a meeting of said stockholders, for the purpose of electing a president and four directors of said bridge company. And said president and directors, when elected, shall take an oath faithfully to discharge the duties of directors of said corporation, and continue in office for one year, and until their successors shall be duly qualified.

SEC. 5. *And be it further enacted*, That said president and directors shall have power to make and perform all necessary contracts for erecting said bridge, and carrying on all other business of said corporation; and they shall have power to appoint all officers, and employ such servants as may be necessary for managing the affairs of said corporation; and that the stockholders shall be individually liable in proportion to their respective shares for all contracts made, bonds, bills, notes executed by said president and directors in the name of said corporation, whether the same be under its seal or not.

SEC. 6. *And be it further enacted*, That if any subscriber of stock in said bridge company, shall fail to pay his installments as required by said president and directors, they shall have power to de-

clare such shares forfeited to the company; and after giving thirty days' public notice, to offer them for sale at public auction, for ready money, or so many as will be sufficient to pay the amount then due and called in. A sale thus made shall vest the purchaser with all the rights of the original holder, but shall not release such holder from the payment of any balance that may be due on his subscription, should the stock sold produce less than the whole amount subscribed therefor; and should the money called in be paid before a sale actually takes place, together with the costs incurred preparatory to such sale, it shall restore the stock to the original holder, notwithstanding the forfeiture.

SEC. 7. *And be it further enacted*, That the rates of toll for crossing on said bridge shall never exceed the present rates of ferriage at said ferry. And until said bridge shall be completed, the owners of said ferry shall enjoy all the profits arising therefrom, notwithstanding they may have subscribed the interest therein as stock in said bridge company.

SEC. 8. *And be it further enacted*, That said corporation shall and may hold annual meetings of the stockholders, at which the president and directors shall lay before them an account of their proceedings of the preceeding year, showing all disbursements and receipts of said corporation; at which or some other general meeting of said stockholders, the president and directors of said company shall be elected and at such meeting only shall the capital stock of said bridge company be in-

creased. Provided, that said company shall in no case exercise banking privileges.

Approved January 12th, 1832."

The said Florence Bridge Company was duly organized and constructed and operated a toll bridge for many years, until its pretended purchase by the complainants, the Memphis and Charleston Railroad Company.

Complainant was incorporated in Tennessee in 1846 (see charter made part of the bill, page 11 of the record), and in Alabama in 1850, and by its Alabama charter it was given the rights contained in the Tennessee charter, and especially the power relied on in this cause, viz:

"The said company may purchase, have and hold any bridge or turnpike road over which it may be necessary to carry the said railroad and when said purchase is made, to hold the said bridge or turnpike road on the same terms, and with all the rights which belonged to the individual, individuals or corporation from which said purchase may be made."

Section 23, Tennessee Charter.

Complainant alleges that under this power it "purchased from the said Florence Bridge Company its said bridge, and has, ever since said purchase, made some time in the year 1850, operated the bridge under the charter of the said Florence Bridge Company, having a toll bridge for that purpose and also a bridge above the toll bridge for the use of its railroad business."

No power in the bridge company to sell its fran-

chises and property is alleged or shown except the said power of the railroad company to purchase.

In 1832 Florence, north of the river, was a town of about 1,000 inhabitants, and Tuscumbia, south of the river, about the same size; Lauderdale county, north of the river had 11,000 population, and Franklin county, south of the river, about the same. In 1894 Florence had 7,000 population; Tuscumbia had 2,500 inhabitants, and Sheffield (founded in 1887 and situated between Florence and Tuscumbia) had 2,500 inhabitants. By the census of 1890 Lauderdale county, north of the river, had nearly 24,000, and Colbert and Franklin (formerly Franklin) more than 30,000 inhabitants.

In 1830 these counties were agricultural, producing probably 2,000 bales of cotton and a limited amount of corn and cattle.

Now the country is a manufacturing district. There are at Sheffield and Florence seven iron furnaces, whose tonnage it is stated is equal to the tonnage of the entire cotton crop of the south, a cotton factory, rolling mill, compress, wagon factory, buggy factory, pump factory, shoe factory, stove factory, steel rolling mills, fertilizer manufactory and flour mills; and Lauderdale county now also produces 10,000 bales of cotton annually, and Colbert as much.

In 1832 no railway had been constructed. In 1894 three railroads, the L. & N., the M. & C. (now the Southern), and the Northern Alabama, were in operation and a fourth graded, with superstructures ready for the rails. In 1894, in addition to thorough-fare tolls, 11,481 cars passed over the

railway portion of the Florence bridge, and in 1896, 21,834 cars.

The railroads extend east and west and especially north into the iron ore fields of Tennessee and south into the coke fields of Alabama, and haul the raw material, the iron and the coke, over the Florence bridge to meet and manufacture iron in the furnaces at Florence and Sheffield. See Record, pp. 115 to 145 inclusive.

Complainant, the railroad company, had been charging either exactly or a little less than the old ferry rates on the toll bridge. The people begged for a reduction, and applied to the courts, and at last to the legislature, where, complainant being represented by its attorneys, the act complained of was passed, reducing the tolls at a time when the population of the adjacent towns had increased seven hundred per cent. and traffic over the bridge had increased at least one thousand per cent., the reduction being to the charges made elsewhere for like services, to about sixty per cent. of the old rate.

The act is in words and figures as follows:

"AN ACT

To fix the maximum of tolls to be charged by the owners, lessees, or operators, of the road bridge crossing the Tennessee river, between the counties of Colbert and Lauderdale, and known as the Florence bridge, and to fix the penalty for demanding or receiving a higher rate of toll.

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That the maximum rate of toll to be charged by the owners, lessees, or operators of the

bridge crossing the Tennessee river, between the counties of Colbert and Lauderdale, and known as the Florence bridge, shall be as follows: For each foot passenger, 5 cents; for children under 14 years of age and all pupils attending school, 2 cents; for each one-horse vehicle and driver, 15 cents; for each two-horse vehicle and driver, 25 cents; for each three-horse vehicle and driver, 30 cents; for each four-horse vehicle and driver, 35 cents; for each additional person in vehicle, 5 cents; for each horse, mule or animal of like kind, with rider, 8 cents; for each horse, mule or animal of like kind, 5 cents; for each cow, steer or animal of like kind, 5 cents; for each sheep, hog, goat or animal of like kind, 3 cents.

SEC. 2. *Be it further enacted*, That should the owners, lessees or operators of said toll bridge, by themselves or any of their agents, demand or receive from any person a higher rate of toll than is prescribed by this act, he or they shall forfeit to such person twenty dollars for each offense, to be recoverable before any justice of the peace or notary public and ex-officio justice of the peace of either of said counties of Colbert or Lauderdale.

Approved February 9th, 1895."

Immediately upon the passage of this act, five days after its approval, Complainant, the receivers of the Memphis and Charleston Railroad Company, by the direction and leave of the Hon. John Bruce, District Judge, commenced this suit "*to test the constitutionality and validity of said act*," naming as defendants The State of Alabama, William C. Oates its Governor, and William C. Fitts its Attorney-

General, as such Governor and Attorney-General. It having become the duty of A. H. Carmichael, circuit solicitor for the eleventh judicial circuit of Alabama, to prosecute the toll keepers of said bridge, for charging illegal tolls, prohibited by section 4151 of the Code of Alabama, the bill was amended by making him a party defendant to enjoin him from prosecuting these criminal cases. W. H. Gilliam, a citizen residing near the bridge, who protested against paying the illegal toll and threatened to bring a suit, was also made a party defendant by amendment. The bill was also amended about a year after suit was commenced by striking out the State of Alabama as a party defendant.

The prayer of the bill was that said act prescribing rates be declared repugnant to the constitution of the United States and null and void and injunctions issue as prayed for.

Injunctions duly issued restraining the State of Alabama, its Governor and Attorney-General, its Circuit Solicitor, and W. H. Gilliam and all persons whomsoever from any proceeding, civil or criminal, to compel complainant to obey said act prescribing tolls or to forfeit the franchises of complainant on account of its refusal to comply with said act.

Defendants moved to dissolve said injunctions, to dismiss the bill for want of jurisdiction and for want of equity,—demurred to the bill on many grounds for many reasons, for that the case was a suit against the State of Alabama, for that there were no proper parties defendant, the Governor and Attorney-General being charged with no duties or powers with reference to the said act, for that the alleged contract by which it was pretended that

complainant had purchased said bridge was illegal and void, and for other defects in the bill.

The court overruled said motions and demurrers and the defendants answered. Proof was taken and the cause submitted, and on the 15th day of April, 1897, the Circuit Court, Judge Aleck Boarman presiding, rendered a decree adjudging that said act prescribing rates on the Florence bridge was violative of the rights of complainant as the owners of said bridge, that it was invalid and unconstitutional and that the injunctions be made perpetual.

Defendants appealed from said decree, assigning forty-three errors made in said cause during its pendency in the Circuit Court, set out on pages 184 to 188 of the record.

Appellants on the 11th day of March, 1998, moved this court to advance said cause, which motion was duly granted and the cause set down for hearing on the 17th day of October, 1898.

A Suit Against the State.

That this suit is brought in defiance of the 11th amendment to the Constitution of the United States is shown in its inception (See prayer of the intervening petition, page 2 of the record) and is shown by the order of the District Judge which not only authorized the Receivers to commence this suit against "The State of Alabama," but directed them to so prosecute the same both in the Circuit Court and in the Supreme Court of the United States.

"In cases where a State is a party on the record

the question of jurisdiction is decided by inspection." Osborn v. U. S. Bank, 9 Wheaton 852.

The suit was commenced on the 14th day of February and all the pleadings, orders, decrees and proceedings in the cause were maintained as a suit against the State of Alabama for a period of one year, until the 30th day of January, 1896, when the court gave leave to amend the bill by dismissing the State of Alabama as a party defendant. It is true that William C. Oates, as Governor, and William C. Fitts, as Attorney-General, were also made parties defendant, but they were sued not as individuals for the purpose of preventing them from enforcing an enactment alleged to be unconstitutional, but they were brought in as Governor and as Attorney-General in their official capacity.

Paragraph 2 of the bill is as follows: "The said William C. Oates is now Governor of the State of Alabama, and said William C. Fitts is now Attorney-General of the State of Alabama, and this suit is brought against said State, Governor and Attorney-General, as such, to test the constitutionality and validity of the act to fix tolls on the Florence bridge."

The State has also a pecuniary interest. Costs were decreed against the officers of the State. It is inconceivable that the State will not reimburse these officers out of its treasury. Hence it is submitted that the steps taken by the Complainant, and by the Circuit Court indicate so clearly their purpose and effort to make the State a party and to bind the State through its officers by the decree of the Court that Complainants are estopped from

saying that this is not a suit against the State, but will be held to the meaning intent and purpose declared by themselves and that therefore the order of this Court should be to dismiss this cause because it was not only in effect, but actually a suit commenced and maintained against the State of Alabama.

In Pennoyer v. McConnaughy, 140 U. S. 1, it was held: "It is well settled that no action can be maintained in any Federal court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides that 'no State shall pass any law impairing the obligation of contracts.' This immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly it is equally well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself."

A suit against the officers of a State as representing the State's action and liability and thus making it the real party against which the judgment will so operate as to compel it to specifically perform its contracts, cannot be maintained.

Reagan v. Farmers Loan & Trust Company, 154 U. S. 389.

One of the purposes of this bill is to declare the act invalid because it impairs the obligation of the

contract made by the State with the Florence Bridge Company. One of the clear purposes of the bill is to enforce by injunction the specific performance of the alleged contract between the State of Alabama and the Florence Bridge Company. (See section 9 of the bill, page 6 of the Record). Another purpose was to prevent the State from forfeiting the franchises of Complainant, by proceeding against Complainants directly for usurpation of charter. See prayer of amended and supplemental bills, pp. 29 and 39 of Record.

NOT A PROPER OR REAL CAUSE. PARTIES DEFENDANT NOT PROPER OR REAL PARTIES.

It is not sufficient as a general rule to bring in mere nominal parties.

If not a suit against the State, then this should be a suit against individuals to prevent them as officers of the State from enforcing an unconstitutional statute.

Smith v. Ames, 169 U. S. 518.

Reagan v. Farmers Loan & Trust Co., 154 U. S. 389.

But this is not a suit against individuals claiming to act as officers of the State and committing acts of wrong to the property of Complainant. The suit is brought against the State itself, and its Governor and Attorney-General, as such Governor and Attorney-General. The sixth, seventh, eighth and twenty-fourth demurrers, and fifth ground for dissolving the injunction, page 81, are included in the assignments of error making this objection to this singular proceeding.

The act complained of is very short, prescribing rates in one section and providing in the second that any person charged a higher rate may bring a civil suit for a small penalty What has the Governor or Attorney-General or the prosecuting Attorney to do with this act? What connection have either of these officers with this act which refers to an exceedingly small part of the alleged property of a corporation doing business in a small section of the State? The Governor is charged with no duty. The Attorney-General is not required by the act to enforce it. The prosecuting attorney brought in afterwards by amendment has nothing whatever to do with this act. He prosecutes crimes arising under other statutes and certainly he cannot be enjoined for doing his duty in this regard, nor could he have been made a party and so enjoined from enforcing the criminal laws of the State if this act had made the over-charge a misdemeanor instead of simply providing a civil remedy. The truth is that Section 4151 of Code of Alabama under which the indictments were found (See page 34 of Record) has no connection with nor reference to the act complained of. These officers have no interest in the *lis contestata*. Neither is it shown nor alleged that they ever threatened to do anything or could do anything more than the other officers of the State in other departments of the State Government.

This action was commenced five days after the approval of the bill. Improperly and improvidently commenced it was not an actual litigation. It was not a case brought by a citizen under the

forfeiture clause of the statute. It was not an indictment prosecuted to punish the servants of the Complainant for charging more toll than the laws of the State allowed. It was a desperate effort to attack the sovereignty of the State,—the validity of an act of the legislature,—when no cause of action had arisen which could properly invoke the exercise of the powers of the Courts to pass upon the validity of the act alleged to contravene constitutional rights.

The bill boldly and baldly declares that its whole purpose is to test whether the act of the Legislature is valid or not. Complainants refused to obey the act as the law requires all good citizens to do until it could be properly declared invalid by the courts. To do this might have shown that the reduced rates prescribed would really bring more revenue than the old rate.

The exigency was not an invasion of the property rights of complainant. The Legislature had passed the act, but nothing else had been done. Neither the Governor nor the Attorney General had said one word or could commit a single act of wrong to complainant when this bill was exhibited against the State of Alabama, and the Governor and Attorney General as such Governor and Attorney General were made parties for the sole purpose of having the court to try, under this most unheard of and extraordinary jurisdiction, the validity of the act.

We can find no case like it. In the Nebraska case, 169 U. S., 518, the AttorneyGeneral was a party defendant, but he was so made because he was a member of the board of transportion charged

by the act complained of with the specific duty of enforcing it. That was a suit by the stockholders of the corporation against the corporation and the board of transportation.

In the Kentucky case, Covington, etc., Turnpike Co., v. Sandford, 164 U. S. 578, the suit was by interested parties to compel the corporation to charge the prescribed rate.

In the Arkansas case, 156 U. S. 649, the action was commenced by patrons of the corporation to recover the penalty for the overcharge. This case is decisive of the proposition we urge, that the case at bar is not properly before the court and should be dismissed. It was there held, page 666, as follows:

"Sometimes in acting on this subject the State Legislatures have created commissions or boards of public works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed—that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected."

"But there are other cases, and the present is one, where the Legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to respond, and, therefore, if the com-

panies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defence to an action for the collection of the penalties."

St. Louis & San Francisco Ry. v. Gill, 156 U.S. 649.

Now the course above suggested as the proper course was open to complainant. He says many suits were threatened. As a matter of fact he does not show this, nor does he show any adequate reason for making W. H. Gilliam, a citizen who seems to be for the purpose of this suit, a man of straw, a party defendant. Gilliam says that he crossed the bridge, was forced to pay the illegal toll, protested against it, and threatened to bring suit for the twenty dollars. Was this enough to authorize this suit in equity and its decision upon a question involving the rights of so many people who are not and could not be made parties to this bill? It is what Judge Marshall, in Osborn v. U.S. Bank, 9 Wheaton 839, terms the "light and frivolous threats of an individual, not sufficient to warrant an injunction."

It seems also from the record that an indictment was found against the bridge-keeper. In this way, it is possible the question could have been properly raised. But not by alleging, as complainant does in his curious bill, that the grand jury of Lauderdale county, claiming to act as officers of the State, have committed acts of wrong, etc. Page 38, sec. 5, supplemental bill.

The other side is only this. A very small amount of property or income was involved if the

statute had been executed for awhile, and the chances are that the additional traffic resulting from the reduced rate would made the amount involved inconsiderable if anything.

Surely it was only fair and right to the State of Alabama—to this legislative act of the State; to the chief executive officers of the State who have been brought into court and charged with costs; to the people whose rights are affected by the decrees in this cause—that the act of the Legislature should stand as the law of the land until the jurisdiction of the courts could be properly invoked and exercised.

In the Texas case, 154 U. S. 366, the members of the Railroad Commission were made parties defendant, but they were charged by that act with the duty of making rates. The Attorney General was also made a party, but by section 19 of the act he was required to institute suits in the name of the State for the heavy penalties provided for in the act. And the prayer of the bill was to restrain him from bringing these prescribed suits.

In the New York case, 143 U. S. 517, the act itself contained a provision making it a misdemeanor to charge more than the prescribed rate, and the case was a criminal prosecution under this section of the act.

In the Minnesota case, 134 U. S. 418, there was a petition for a mandamus by the Railroad Commission which was invested with the power by the act to proceed in that way, the writ being for the purpose of compelling the corporation to observe the prescribed rates.

How unlike all the above cases or all the cases

upon this subject, is the case at bar! This case seems to be in the nature of an appeal from the Legislature to the court, as quickly taken as if it were meant to rely upon something like the veto power of the Executive instead of the solemn and final decision of the judicial power invoked in the proper and legal way.

The following observations of this court in the Michigan case, 143 U. S. 339, are directly in point. That suit, like this, was brought to test the constitutionality of an act of the Legislature and was commenced the very day the act went into force, while this suit was brought five days after the approval of the act. The court said, page 344, "The theory upon which apparently this suit was brought is that parties have an appeal from the Legislature to the courts, and that the latter are given an immediate and general supervision of the construction of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any legislation, State or Federal, the decision necessarily rests upon the competency of the Legislature to so enact. The court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort and as a necessity in the determination of real, earnest and vital controversy between individuals.

Chicago, &c., Ry. Co. v. Wellman, 143 U.S. 339.

Said Allen, J., in The People of New York v. Canal Board of New York, et al., 55 N. Y. pages 394 to 397, "A court of equity has no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity jurisdiction." And, again it is not sufficient "that the legislature have enacted a law which, in the opinion of the attorney-general, is obnoxious to some of the provisions of the State Constitution, and under color of which he is apprehensive that a public body, of which he is a member, may at some time proceed and take action in a manner prejudicial to the interests of the State. The courts can not be called upon to pass upon the validity of a law, upon the mere suggestion that it is void, and that possible action may be had under it, and in advance of any proceedings had or threatened by the officials, who, if the law were valid, would be called upon or authorized to act. The appeal presents simply in this view a theoretical or speculative question, which, whatever its merits, can only be judicially decided when facts arise giving the court jurisdiction, and making a decision necessary, and giving it practical effect when made."

A court of equity will not interfere to prevent the invasion of a franchise before the establishment of the right at all, even where it is derived from an act of the legislature, if upon an inspection of the statute a reasonable doubt exists as to the power of the legislature to enact it. Courts of equity can not interfere to stay proceedings in criminal mat-

ters—nor in any case not strictly of a civil nature—nor to arrest the authorities charged with the execution of criminal laws.

Moses & Beebe v. Mayor of Mobile, 52 Ala. 198.

INJUNCTION WILL NOT LIE TO RESTRAIN THE ACTION OR DISCRETION OF EXECUTIVE OFFICERS OF THE STATE.

The Governor, the Attorney-General, and the Circuit Solicitor are constitutional officers of Alabama, invested with large political and discretionary powers by the Constitution and laws of the State. The act complained of devolves upon them no ministerial duties whatever. If they have any duties to perform arising out of this enactment, which is a matter of doubt, these duties are clearly not ministerial, but duties which require the exercise of judgment and discretion in matters governmeutal in their nature under such circumstances that all the authorities agree that its exercise is clearly independent of the other co-ordinate departments of the government and is not subject in any manner to their supervision.

Under our form of government one department makes the laws, another applies the laws in contested cases when a suit duly authorized by law presents in due form a cause appropriate for its cognizance, and the third department executes the laws. Each department is prohibited from exercising the duties of the other.

The President of the United States will not be enjoined from carrying into effect an act of Con-

gress alleged to be unconstitutional, nor will a bill having such purpose be allowed to be filed.

Mississippi v. Johnson, 71 U. S. 475.

State v. Lord, 28 Oregon, 498.

People, ex rel Southerland v. Governor, 29 Mich. 320.

Injunction in itself is not prerogative but jurisdictional. It is issued in cases where the court has jurisdiction—otherwise as preliminary or interlocutory to the final decree and to give effect and permanency to such decree. It is remedial and in aid of jurisdiction already attached.

28 Oregon, 516, supra.

The jurisprudence of the United States has always recognized a distinction between common law and equity as, under the constitution, matter of substance as well as of form and procedure.

Green v. Mills, 69 Federal Reporter, 832.

It is well settled that the court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature nor to interfere with the duties of any department of government unless under special circumstances, and when necessary to the protection of rights of property nor in matters merely criminal or merely immoral which do not affect any right of property. Ib. 857.

"Neither the legislative nor the executive department can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cogni-

zance." Ib. cited from the opinion of Chief Justice Chase, in Mississippi v. Johnson.

The judiciary has not the right to pass upon the constitutionality of laws as a mere means of settling abstract questions, and, even in the enforcement of private rights, it has not the power to interfere with the discretion vested in the other departments, or with the exercise of the political powers of those departments.

Ib. pages 862 and 863.

3 Amer. & Eng. Cases in Equity, pp. 546, 553.

State ex rel. v. Thorson, 68 N. W. Rep. 202.

No Court will Establish or Execute an Illegal Contract.

Neither the charter of the Florence Bridge Company nor any amendment thereof nor any general law of the State contains any power to sell or alienate its property or franchises.

It was held in V. & C. R. R. v. Vt. Central R. R., 34 Vt. 47 and 48, that if a contract is in violation of public law or against public policy in such sense as to make it void and of no effect to any intent, any person standing in a relation of interest to the subject matter of the contract and to be affected by this operation might set up and insist on such fatal vice in it for the purpose of clearing himself from the consequences of its being carried into effect.

Case v. Kelly, 133 U. S. 21.

South & North Alabama R. R. v. Highland Ave. & Belt R. R., Supreme Court of Alabama, November Term 1897.

The parties named as defendants to this cause are so disconnected from any interest in the subject matter that it is doubtful if this objection, although clearly appearing on the face of complainant's bill, can be raised. If this is a suit against the State, then it is possible that the attention of the court can be called to the void and illegal contract upon which the bill is based. The State could in a direct proceeding attack the complainant for the usurpation of the franchises of the Florence Bridge Company. That the State or its executive officers may be allowed in this case to suggest the violations of law committed by complainant in acquiring this property may be predicated from the fact that defendants are restrained by the amended bill, pages 29 and 39 of the record, from instituting any proceeding against complainant for the forfeiture of the franchise of the Memphis and Charleston Railroad Company in and to the said bridge on account of its refusal to charge the prescribed rates. In other words, while this is not a direct proceeding by the State to attack the franchises of the corporation, it seems to be an action by complainant to enjoin the State from any such direct proceeding. In such a case it would seem to be competent for defendants to show as in a direct proceeding that this alleged acquisition of the charter and the property of the Florence Bridge Company is void and illegal. Besides, the prohibitions of the Fourteenth Amendment refer directly to the action of the State whether by its legislative, executive, or judicial authorities, and therefore, whoever, by virtue of a public position under the

State government, depriues other of any right protected by that amendment, acts in the name and for the State, and is clothed with the State's power and his act is that of the State. C. B. & Q. R. R. v. Chicago, 166 U. S., 233 and 234.

All contracts contrary to public policy are void. A contract is void when it will not be enforced by the courts. If a court should enforce such a contract it would employ its functions in undoing what it was established to do.

There is a distinction clearly defined in the books between contracts merely *ultra vires* and hence invalid, and contracts which are also illegal. Illegal contracts are, in a sense, *ultra vires*, but they are something more, they are contracts of "an evil tendency."

Elliott on Railroads, Sec. 383.

Bishop on Contracts, Sec. 473.

Contracts absolutely void as contravening the long settled rule of public policy "are an absolute nulity and life cannot be given to them by any doctrine of estoppel or ratification."

Wood on Railroads, Vol. I, Sec. 172.

No court will establish or execute an illegal contract. No court will usurp or allow any usurpation of the legislative power of the government.

The charter is shown and relied on. There is therefore no room for prescription as to what fixes the rights of the public. The complainants show their grant, profess to be acting under it, and at the same time claim to do acts not authorized by it.

These claims are repugnant and cannot be sustained.

Toll Bridge Co. v. Osborn, 35 Conn., 21.

Spelling on Private Corporations, Sec. 18.

The contract set up in this case is illegal by the common law of the land and also by the statutes of the State of Alabama in existence at the time the contract was made. Section 1483, Code of Alabama, of 1852, enacts that no private corporation shall exercise any power not given in its charter nor enumerated in Section 1481. Sec. 1481 confers powers of succession, to sue and be sued, to hold, purchase and convey real and personal property limited by its charter or if not so limited such as its business requires, to appoint officers and agents and make by-laws. In construing an exactly similar statute in New Jersey, the New Jersey court held, 20 New Jersey Equity, 564, "The legislature has a policy in this matter, it is clearly declared, and the section must be taken as a prohibition of any acts not within the scope of the powers permitted. Contracts in contravention of it must be held to be illegal and of no binding obligation.

Morris & Essex Rd. Co. v. The Sussex Rd. Co. 20 N. J. Eq. 542.

The leading case on this subject is Thomas v. Railroad Co., 101 U. S. 71. This court there declared that where a corporation has by its charter a franchise intended in a large measure to be exercised for the public good, any contract which disables the corporation from performing these functions and which undertakes, without the consent of the State to transfer to others the rights and pow-

ers conferred by the charter is a violation of the contract with the State and is void as against public policy.

The most recent case in this court (L. & N. R. R. v. Ky., 161 U. S-, pp. 677, 691, & 2,) holds that in any such contract the parties are bound to show not only that the purchaser was competent to buy, but that the seller was vested with the power to sell, and that such a contract beyond the coporate powers of either party is beyond the corporate powers of both. So. also on this very point the case of State v. Consolidated Coal Co., 46 Md. 1.

Oregon R. R. v. Oregonian Ry. Co., 130 U. S. 1.

Penn. R. R. v. St. L. A. etc,, 118 U. S. 290.

Cen. Trans. Co. v. Pullman's Car Co. 139 U. S. 34.

In the State of Alabama, where these charters were granted and where the illegal contract was made, the doctrine is well settled and the decisions of the Supreme Court are very significant.

In the Grand Lodge of Alabama v. Waddell, 36 Ala. 313, it is said that courts of justice will not enforce contracts of corporations which they have no power to make, and no actions to enforce such contracts will be maintained. Again, it is not for courts, by tolerating the usurpation by corporations, to defeat the will of the Legislature. The doctrine of estoppel cannot be held to apply without clothing corporations with the ability to increase their powers indefinitely, by sheer usurpation. Such contracts are void, and no right of action can spring out of them.

Chambers v. Falkner, 65 Ala. 455.

Westinghouse Mach. Co. v. Wilkinson, 79 Ala. 314.

Among the later cases upon the subject is that of the Lanier Lumber Co. v. Reese et al, 103 Ala.628, in which McClellan, now Chief Justice, said: "Courts will not interfere in the enforcement of void contracts. The relief prayed cannot be granted without the establishment and execution of an illegal and void contract. It therefore cannot be granted at all, because no court will decree the performance or grant relief dependent upon proof of such a contract."

~~There seems to be a vage attempt to assert in the bill that the judiciary of Alabama have recognized in Johnson v. State, 88 Ala. 176, the power of sale set up in this cause. It is certainly sufficient to reply that the pleader in making out complainant's case failed to allege that the case of Johnson v. State, 88 Ala., cited by him, was expressly disaffirmed and overruled in the subsequent case of Johnson v. State, 91 Ala. 70.~~ The controlling question, and the controlling principle is that if the relief prayed for cannot be granted without establishing the void and illegal contract it will not be granted at all. Complainant alleges the acquisition of the franchises and property of the Bridge Company only by virtue of the void and illegal contract.—Sect. 7 of bill, page 5 of Record. The final decree by its terms, establishes the ownership of the property thus acquired in defiance of a statute of the State, and of public policy.

Prescribed Rates Reasonable.

The following table (see Record, p. 4 & 6,) show the old and the prescribed rate:

FLORENCE BRIDGE—RATE OF TOLL.

	Old Rate Still Charged.		Prescribed Rate.						
Horses, mules or cattle, each	$ .10		$ .05						
One person	.10		.05						
One man and horse	.20		.08						
			1 additional person.		2	3	4	5	etc., etc.
One horse, buggy, cart or dray	.30	and driver	.15	$ .20					
Two horse carriage or buggy	.50	" "	.25	.30	$ .35	$ .40			
Two horse carriage, capacity 6 persons	.70	" "	.25	.30	.35	.40	$ .45	$ .50	
Two horse or ox wagon	.60	" "	.25	.30	.35	.40	.45	.50	
Four horse or ox wagon	.70	" "	.25	.30	.35	.40	.45	.50	
Six horse or ox wagon	1.00	" "	.35	.40	.45	.50	.55	.60	
Special school tickets	.04		.02						
Sheep, hogs or goats	~~.06~~ .10		.03						

This case is within the influence of the principles announced by this court in the Charles River Bridge Case, 11 Peters, 420.

In that case the rule of strict construction of corporate grants was adopted which has been followed by this court in the cases of Thomas v. Railroad Co., 101 U. S. I., and kindred cases up to the recent case of Pearsall v. Gt. No. Rwy. Co., 161 U.S. 646, in which the Charles River Bridge case was cited.

Chief Justice Taney said that it would present a singular spectacle if, while the courts of England were restraining within the strictest limits, the spirit of monopoly and confining corporations to the provisions plainly given to them in their charters, the courts of this country should be found enlarging these privileges by implication and construing a statute more unfavorably to the public and to the rights of the community than would be done in an English court of justice.

"The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience and developing public prosperity by providing safe, convenient and cheap ways for the transportation of produce and for purposes of travel shall not be construed as having been surrendered or diminished by the State unless it shall prove by plain words that it was intended to be done."

This court held further that it was competent for the Legislature to authorize the construction of a free bridge so near the bridge of the complaining corporation which had the right under its charter

to charge tolls, as practically to deprive the first company of all tolls and to destroy its franchise to collect tolls.

The Florence bridge does not seem to have been organized by a company of adventurers for the purpose of making money. This appears from the fact of the limited population and business at the time the charter was granted and the bridge constructed. It appears from the charter that the enterprise was a local one, the books to be opened at the Eagle Hotel in Florence and the company to be organized when the small sum of sixty thousand dollars should be subscribed. It appears also from the fact that the stockholders were made individually liable for contracts made by the corporation. The Memphis and Charleston railroad was not extended to Florence solely in the interest of that corporation; it might be affirmed that it was not constructed to Florence as a money-making adventure. Section 2 of the Alabama Charter, Record, page 21, provides: "And be it further enacted, That in the event the said road shall be located through Tuscumbia it shall be the duty of the company to construct a branch to Florence, and in the event the road shall pass on the north side of the Tennessee river near Florence, it shall be the duty of the company to construct a branch to Tuscumbia, provided the subscriptions in the town or county applying for such branch shall be sufficient to pay the cost of the same."

In consideration of this charter and the other rights granted therein, complainant undertook to

construct and operate five miles of railroad including within this short distance the expense of a bridge over a river a half mile wide. The public on either or both sides of the river agreed to subscribe the money necessary to construct the road. Clearly it was built for their convenience and for their prosperity. Clearly the corporation contracted to construct and continue this line including the pontage over the river, whatever pecuniary advantage or loss might result.

The learned counsel for the appellees in the Nebraska rate case just decided insisted in that case that where there was the right to charge tolls not limited by any express provision of the charter there was also an implied right to charge such tolls as amounted to a full return on the costs of construction or the investment made. But surely no such right can be implied from a charter like this which obliges the corporation to construct a short branch road and to maintain it, and which, with reference to bridge tolls, confers on the corporation the right to hold only upon the terms of the bridge charter a bridge chiefly constructed for the benefit, the convenience and the comfort of the people directly interested in it.

The bill was prepared on the theory that there was a contract between the State and the corporation, and long depositions were taken by the complainant to show that the rates on the bridge did not exceed the ferry rates, but there is no such contract.

The Georgia Railroad and Banking Company v. Smith, 128 U. S., page 174.

And if there had been, such contract right would not have passed to complainant even if it had made a legal purchase of the Florence Bridge.

Covington Turn-pike Company v. Sandford, 164 U. S., page 586.

The present doctrine of this court is that the charge must be reasonable, the rights of the public considered, and that each case must be examined in the light of its peculiar facts and circumstances.

Smith v. Ames, 169 U. S., page 466.

Covington Turn-pike Co. v. Sanford, 164 U. S., page 578.

Ragan v. Farmers' Loan and Trust Co., 154 U. S., page 362.

Grand Trunk Railway v. Wellman, 143 U. S., page 339.

Budd v. New York, 143 U. S., page 517.

Chicago, Milwaukee, etc., Railway v. Minn. 134 U. S., page 418.

Dow v. Beidleman, 125 U. S., page 680.

These cases establish, First, That a legislative regulation of rates is presumably reasonable, Judge Brewer having observed that "it is not to be supposed that the legislature of any State will ever engage in the deliberate attempt to cripple or destroy institutions of such great value to the community as railroads, but will always act with the sincere purpose of doing justice to owners of railroad property as to other individuals."

154 U. S., page 395.

"Hence it has been conceded that when cases have been presented in which it had been claimed that the rates were unreasonably low, but not clearly shown to be so, the court has declined to interfere."

169 U. S., page 515.

And hence it is the settled doctrine that the legislature has the right to fix rates and the extent of judicial interference is to protect against unreasonable rates.

Chicago, etc., Ry. v. Wellman, 143 U. S., page 339.

The basis of all calculations as to the reasonableness of the rates to be charged by corporations maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public.

Smith v. Ames, 169 U. S., page 546.

The most salient and striking point about this case is that the prescribed rates apply merely to a small portion of the property. The regulation is only of the tolls on the toll bridge which is valued by complainant at about one-fifth of the value of the entire structure, although it is really worth much less. It is a matter of proof that there was first a flat boat and then a horse ferry and then a steam ferry and then a toll bridge and then a railroad and toll bridge combined affording transportation across the river at Florence. It is a matter of common knowledge that persons and things are in this age transported on the improved highways called railways. All the traffic that goes over the

rail portion of this bridge is undisturbed by this act of the legislature. All the profit that can be made by the railway in this rapidly developing and flourishing country is not in the least reduced by this act of the legislature. If there had been intended a wanton and unreasonable invasion of complainant's rights, or the taking of their property, why should not the legislature have prescribed rates on the railway part of the bridge over which it is shown that 21,000 cars passed last year?

When complainant filed his bill and in the first proof taken by him he made no mention of the railway or its value or its earnings. It is suggested that it is doubtful now if the state of the pleadings will allow the evidence he has introduced on this subject, to which objection was duly made. But after demurrer on this account and without amendment to the bill evidence was offered. It is chiefly to be found in the curious table made by the Auditor of the company and given on page 159 of the Record.

But this evidence is inadequate.

It does not show what are the net earnings of the Memphis and Charleston Railroad Company, the entire line, or even that part of the line in the State of Alabama, or even the earnings of the branch road from Tuscumbia to Florence, or fairly even the earnings on the railway part of the bridge. Indeed, there is no allegation in the bill to make such evidence relevant.

In St. Louis and San Francisco Railway v. Gill, 156 U. S. 649, the effort made to declare invalid an act of the Arkansas legislature failed for this very

reason, viz: that that the evidence was restricted to a part only of the railroad. This Court in that case affirmed the reasoning of the Supreme Court of Arkansas in Railway Company v. Gill, 54 Ark. 101, in which it was said, "The appellant cannot claim the right to earn a net profit from every mile, section or other part into which his road might be divided. It can only claim a profit from the operation of its entire line, and attack as unjust an act that denies it the right to fix such rates as will yield a profit upon its aggregate business. The corporations owning the several parts of the road were disolved years before it was passed. In their behalf no cause of complaint can exist."

This legal conclusion is illustrated and is made necessarily applicable to this case because the attempt is made to charge the Florence Toll Bridge with a portion of the general expenses of the entire Memphis and Charleston Railroad. (Pages 160, 161 and 162 of the Record.) And because the Florence Bridge has been converted into a railroad bridge and made a part of Complainant's railway line. See Fink & McGehee, Receivers, v. Clark & Malone, Tax Assessors, U. S. Cir. Ct. of Appeals, 5th Circuit, November Term, 1897. See Contracts for bridge construction, pp. 169 to 172 of Record.

Complainants show on the face of their bill that they have no Charter right to the bridge. If they have acquired it at all, they purchased it and hold it as they hold any other property of which they have acquired the title and possession by lapse of time. It has become consolidated and absorbed in the general railway which they own, and of which

it is a part. Hence the reduction of rates on the bridge, if otherwise reasonable, must amount to enough to affect their entire earnings, otherwise they cannot complain.

The attention of the Court is called to the persons who testify for complainant. As to the value of the bridge no engineer is brought in to testify. As to the earnings, no freight agent. The General Superintendent and the Auditor testify, whose sole knowledge is derived from reports made to them of the operation of these properties. This is not the kind of evidence that ought to be sufficient to overturn an act of the legislature, especially when upon investigation and analysis it will be found to be untrue, contradictory and misleading.

The remarks of this Court in Chicago, etc., Railway Company v. Wellman, 143 U. S., page 343, will be found significant in the consideration of this case. "Is the validity of a law of this nature dependant upon the opinion of two witnesses, however well qualified to testify? Must court and jury accept their opinions as a finality? Must it be declared as a matter of law that a reduction of rates necessarily diminishes income? May it not be possible—indeed does not all experience suggest the probability that a reduction of rates will increase the amount of business and therefore the earnings?"

The value of this bridge is about $200,000. In the tables prepared by the servants of this complainant this value is fixed at $230,000, but fortunately we have the contracts in evidence under

which this bridge was built which show its cost and value beyond controversy. The bridge was rebuilt about 1892. The cause of this rebuilding was to afford a safe way for the increased railway traffic that commenced to pass over it after the L. & N. was constructed into Sheffield and Tuscumbia, and after its contract for the use of the bridge. Before this reconstruction, as will be found from the record, page 158, the entire value of the foot bridge was placed at $26,278.62, and of the railroad bridge $92,093.52. Total, $118,372.14.

It is submitted that it was not necessary so far as the foot bridge was concerned to make these improvements, and hence the necessary value of the foot bridge is only about $26,000 instead of $51,000. This view is confirmed by the character of the contracts made for the new bridge. It was to be of iron and steel, capable of carrying a live load of not less than two ninety-two ton consolidation locomotives coupled together, followed by a train weighing not less than 3,400 pounds per lineal foot, in motion, with an additional load of 1,200 pounds in motion for the highway. Contracts, pp. 169-172. Here it is clear that complainant has converted this bridge from a toll bridge into a railroad bridge which will sustain the heaviest locomotives and trains of modern construction. Indeed, in the case of Clark and Malone, Tax Assessors, v. McGhee and Fink, receivers of the Memphis and Charleston Railroad Company, decided in the Fifth Circuit of the United States, November Term, 1897, complainant alleged in his bill referring to this very bridge, "that the thoroughfare feature is a mere incident

of the whole structure, the chief office, purpose and use of the bridge being for the passage of trains." And the Court held as follows: "The bridge is certainly not an ordinary toll bridge owned and operated by a toll bridge company,—it is certainly a very substantial and necessary *railroad bridge* owned and operated by a railroad company." It would seem, therefore, unnecessary to say more or to cite authorities on the proposition that in any inquiry to show whether complainant has been deprived of his property without process of law by this act of the legislature it is necessary to take into consideration the earnings of the entire structure, railway and thoroughfare.

Railway Companies v. Keokuk Bridge Co., 131 U. S. 389.

Bridge Proprietors v. Hoboken Co., 1 Wallace, 116.

In a similar case reversed on other points but not on this point by this Court, it was so held, viz: That while it was not necessary to include the earnings of the ferry, although the bridge company owned it yet, it was essential to consider what was made on either part of the bridge itself. That where foot and wagon ways are a part of a railroad bridge the receipts from the entire structure must be considered to determine whether an act regulating the tolls thereon will reduce the receipts to less than the operating expenses so as to constitute a taking of private property for public use without compensation.

Commonwealth v. Covington & Cin. Bridge Co., 21st S. W. Rep., p. 1042.

The following table is submitted as showing the real value of the bridge:

13 Span iron bridge	$79,500.	Contract page, 171 Record.
Draw, 412 feet	50,075.	Contract page 169, Record.
Piers	60,000.	Pegram and Plants Deposition.
	$189,575.	

But this estimate of value of piers is too high. Note that old piers are worth $1,440 each, and new $2,880, page 179, top of page, and note that the piers of the original toll bridge cost probably only $29,900. See p. 153 of Record.

Now add to this about $11,000, masonry on the piers shown on pages 157 and 158, and we have the real cost and value of this bridge, viz., about $200,000.00.

The $13,172 on page 157, and shown in contract on page 173, ought not to be included in this estimate because it was for a viaduct approach to the Florence bridge. A kind of iron trestle not extending over the river and no more a part of the bridge than the high embankment with which it connects. The real bridge over the river, 2,000 feet between abutments, while entire length of railroad part, including this trestle or approach, is 2,600 feet.—Pegram's depo., p. 85 of Record.

In the contract between the L. & N. Railroad and the M. & C. Railroad the entire value of the structure is put at $230,108.30, but in this contract it was manifestly advantageous for the complainant to have the bridge valued as highly as possible in order to receive interest upon a larger amount from the L. & N. as provided in the contract, and the L. & N. having no other way of getting its trains over

the river except by using this bridge or building a new one would yield something on the point of valuation in order to secure this pontage. Pegram admits that this valuation was on a basis of revenue not cost. See p. 87. But whether the valuation be $200,000.00 or $230,000.00, the complainant concedes that the gross earnings on this bridge for one year are at least $10,654.52. See page 153. Take from this $1,765.81, 40 per cent. reduction of tolls on the roadway and $8,888.71 remain. Add 20 per cent. of $2,648,72 for increase travel on account of deduction of tolls. See Pegram's depo., p. 86, and the gross earnings are $9,418.45.

The expenses, even from the doctored figures made by the Auditor do not exceed for the railway $1,601.93 (See table, page 159), and for the highway $2,268.63 (See table, page 160), in all $3,870.56, which subtracted from $9,418.45 leaves $5,537.89, which is more than 2¾ per cent. on $179,021.77, the value assessed by complainant in its table, or more than 2¾ per cent. on the actual cost of the entire bridge as shown by the figures I have given taken from the contracts for its construction.

Can this be a confiscation of the property set out by complainant in his bill? As long as these profits remain with the constantly increasing profits in a developing country is there any danger? This is the case made by complainant. The actual case is largely different.

The table of earnings and expenses railway part of bridge, p. 159 is manifestly incorrect. The witness seems to apologize for it (page 147) as he ought to do. The M. & C. earnings are reduced to a rate

for half a mile of railroad on a basis of the entire mileage of 292 miles. But interest is charged up on the basis of the highest cost of the bridge, this half mile being segregated from the balance of the line. Now, clearly, each half mile of the M. & C. Railroad, including the bridge, did not cost $179,-021.78, or each mile twice that sum, $358,043.56. And yet this is the absurd result of the Auditor's table. For if the traffic is calculated on this basis so ought earnings to be. But we can freely assume that $40,000 for one mile, or $20,000 for half a mile is a fair estimate of the cost of the M. & C. R. R. The evidence is that the bonded debt is $20,000 per mile, (p. 151). The Auditor's table might be more fairly stated as follows:

	93-4	94-5	95-6
Traffic M. & C. ½ mile rd..	$ 1,208.61	$ 820.79	$ 870.46
Rental	5,020.16	5,368.30	5,369.52
Total gross	6,228.77	6,189 09	6,239 98
Operating expenses	1,607.61	1,564.87	1,601.93
Net	4,621.16	4,624.22	4,638.05
Interest on $20,000 value of ½ mile of railroad at 6 per ct.	1,200.00	1,200.00	1,200 00
Net gain	3,421.16	3,424.22	3,438.05

The half mile of railroad has paid nearly 25 per cent. when its net earnings are estimated on the same basis that its traffic is estimated. Apply this net earning to the roadway earnings and that will pay also 7 per cent.

But the Auditor's tables are incorrect in other ways. Who can believe that the traffic of the M. & C. over the bridge is worth less to that company

than the traffic to the L. & N. is worth to the Louisville Company. And yet the latter pays over five thousand a year.

Besides if the operating expenses are correctly set out, the table should be stated as follows:

	93-4	94-5	95-6
Operating expenses	$1,607.61	$1,564.87	$1,601.93
Of this the L. & N. paid, (See contract, sections 6 and 7, pp 176-7, and table of wheelage. p 163)	43% 691 27	51% 798 08	70% 1,121.35
Leaving to be paid by the M & C	916 34	766 79	480 58
Subtract from total gross, viz	6,228.77	6,189 09	6,239.98
We have net to M. & C..	5,312.43	5,422.30	5,759.40

Or about 28 per cent. on $20,000 the cost of one-half mile of railroad, or more than 3 per cent. on $179,000, complainant's estimate of cost of Ry. part of bridge.

We add some tables which certainly include every item of expense shown by the testimony, or which could be lugged into this case. It is insisted that there is no competent evidence to warrant the admission of the item of expense in these, or any tables entitled General Supervision. And that the total expenses of the railway portion of the bridge for years - - - 93-4 94-5 95-6

amount to	$1,339.27	1,284.34	1,281.70
of which the L. & N. paid	43.2%	51.06%	70.12%

These calculations are made and submitted to show that in the best possible case that can be made for complainant there is no confiscation of his property, but that he makes more than a fair return

upon its value in any fair statement of his profits and expenses.

OPERATING EXPENSES—RAILROAD PART OF BRIDGE. FOR 1893-94.

Roadmaster	$1,650 00		
Supt Bridges and Buildings	1,201 50		
	$2,851 50		
292 miles track	Bridge	$ 4 49	
Supervisor track 100 miles	"	4 90	
Engineer for draw		513 00	
Oil, waste, lamps and other supplies		31 52	
		$553 91	
Railroad proportion 78.4%			$ 434 27
½ Salary day toll keeper watchman, See L. & N. Cont.			256 50
½ " night " " " " " "			256 50
			$ 947 27
Painting necessary every 3 years, 78.4%. Chargeable to Railroad part of bridge, 3 years, $1,500.00; 1 year, $500.00 x 78.4%			392 00
			$1,339 27
General supervision, taxes, etc., based on earnings.			
Total general expenses	$ 204,971 23		
Gross earnings—Entire line	1,274,817 78		
Gross earnings—Railroad part	6,579 26 or .516%		
.516%, $204,971 23			1,061 65
Total Expense—Railroad Part			$ 2,400 92

OPERATING EXPENSES—RAILROAD PART OF BRIDGE. FOR 1894-5.

Roadmaster	$1,620 00
Supervisor bridges and buildings	1,242 00
	$2,862 00

292 miles track		Bridge,	$4 85
Supervisor track 100 miles	970 00	"	4 81
Engineer for draw			486 00
Oil, waste, lamps, etc.,			22 63
			$518 29
Railroad proportion, 78 4% of 518 29			$406 34
½ Salary day toll keeper (watchman)			243 00
½ " night " " "			243 00
			$892 34
Painting necessary every 3 years, 78.4%. Chargeable to Railroad part of bridge, 3 years, $1,500; 1 year, $500 x 78.4 %			392 00
			$1,284 34

General supervision, taxes, etc. based on earnings.

Total general earnings	$ 154,351 95	
Gross earnings—Entire line	1,202,272 58	
Gross earnings—Railroad part	6,191 44 or 515%	
.515% of 154,351.95		794 91
Total Expense—Railroad Part		$2,079 25

OPERATING EXPENSES—RAILROAD PART OF BRIDGE.

For 1895-6.

Roadmaster	$1,620 00		
Sup't bridges and buildings	1,242 00		
	$2 862 00		
292 miles track		Bridge,	$ 4 85
Supervisor track 100 miles		"	4 81
Engineer for draw			486 00
Oil, waste, lamps, coal, etc.,			19 26
			$514 92

Railroad proportion, $614.92, 78 4 %	$ 403 70
½ Salary day toll keeper (watchman) see L & N Cont.	243 00
½ " night " " " " " "	243 00
	$ 889 70
Painting necessary every 3 years, 78.4 %. Chargeable to Railroad part of bridge, 3 years, $1,500.00; 1 year, $500 00 x 78 4%	392 00
	$1,281 70
General supervision, taxes, etc , based on earnings:	
Total general expenses ... ...$ 231,808 27	
Gross earnings—Entire line... 1,348,538 31	
Gross earnings—Railroad part. 6.241 11 or .463%	
.463 % of $231,808.27	1,073 27
Total Expense—Railroad Part	$2,354 97

EARNINGS—RAILROAD PART OF BRIDGE.

(See page 147, Plant's Deposition.)

	1893-4	1894-5	1895-6.
Traffic M. & C. R. R	$1 208 61	$ 8:0 79	$ 870 46
Rental, L & N. R. R.	5.370 65	5,370 65	5,370 65
Articles 3 & 4 p. 175-6. 6% Int on ½ of $179,021.79 See page 158.			
	$6,579 26	$6,191 44	$6,241 11
See Article 6, p. 176. & table p. 163. Add L. & N. proportion of expenses for operating Railroad part of bridge.	1,037 20	1,061 66	1,651 30
	$7,616 46	$7,253 10	$7,892 41
			Total earnings railroad part.
1893-4—43 2% of $2,400 92	—$1,037 20		
1894-5—51.06% of 2.079 25	— 1,061 66		
1895-6—70 12% of 2.354 97	— 1,651 30		
Total Earnings	$7,616 46	$7,253 10	$7 892 41
Total Expenses	2,400 92	2,079 25	$2.354 97
Net Earnings	$5,215 54	$5,173 85	$5,537 44

Interest—			
Valuation of $179,021.79.....	2.91%	2.89%	3.09%
Or on a valuation of $20,000 for the half mile of railroad about	26%	26%	28%

It is singular that the Auditor would not set out the items of the operating expenses on the railway part of the bridge, as he so carefully and elaborately did of the roadway part of the bridge on pages 160 and 161 and 162 of the Record. The query is whether if he had done so it would not appear that some amounts set out in the roadway expenses were not also included in the railway expenses? At least the court was entitled to have this done. The proof must be clear. There must be no evasion or subterfuge. This court has always declined to interfere in these cases unless it was clearly shown that the rate was unreasonably low. If the toll bridge could be separated from the entire structure, still the rates are reasonable. The evidence about this toll bridge is very singular. It is alleged in the bill that the toll bridge is worth $125,000. Pegram in his deposition, pages 185 and 186, is so anxious to sustain the allegations of the bill that he uses the very words of paragraph 10 of the bill in giving his testimony, statement, argument, figures and all. But Pegram seems to be discredited by the statement made on page 88 in which he says absolutely that "we have no net earnings on the bridge, but are running at a loss. Now even the auditor admits in table page 159 a net return of 2½ per cent interest on the railway part of the bridge, and in his table page 160, that the ~~operating expenses~~ net earnings of the roadway part of the bridge varied from 1.6 per

cent. one year to 4.2 per cent. in 1895, and yet Pegram gives certain figures and makes certain tables that must have been taken from the books of the company.

Another curious statement of the value of the toll bridge is taken from the auditor's testimony. He would be expected to do better for his company in the matter of figures than any other witness, and he does not fail in this expectation. He makes the value of the wagon way $176,000.00. (See pages 150 and 163), which is really about the value of the entire structure. The singular thing is the suspicious statement also made by him in the same breath (page 150) that the railroad portion of the bridge is worth $179,000.00; therefore, he has given us a bridge worth in all $355,000.00 necessarily, which is so much more than the contracts show it cost and the company valued it in its contract with the L. & N. Railroad, that the auditor's statements, and testimony, and figures are reduced to a bare absurdity.

This is probably an excellent place to call the attention of the court to the valuations of this bridge by complainant himself and by these witnesses for another most important purpose. Sec. 3972 of the Code of Alabama requires railroad property to be valued at its actual value and the receivers of railroad companies to so return their property for taxation. The record in the case of Clark and Malone against complainant, in the Circuit Court of the United States, Fifth Circuit, decided at the November term, 1897, shows that this Florence branch of 6.80 and 1.70 miles of

railroad, the whole of it including this very bridge, was returned year after year, under oath, for taxation at the value of $25,500.00.

The jurat to these returns is in due form. It recites that affiants personally appeared, and being duly sworn, depose and say "that the value as stated is a full, fair and just appraisement of the same. This affidavit was made and subscribed in 1897, by R. B. Pegram, superintendent, and A. H. Plant, auditor, the two witnesses relied on by complainant in this cause; 1896 again by said Pegram and Plant, witnesses; in 1895 by Pegram; and in 1893 and and 1894 by C. M. McGehee and Henry Fink, the complainants in this cause.

In Pegram's deposition, page 164, he was asked as to what this property was given in for taxation, and referred this matter to Mr. White, the law agent of the company, who answered that it was assessed at $7,500 per mile. Page 174. Therefore the valuation placed by the company upon this bridge is less than $3,750.00—that is, the entire bridge, railroad and thoroughfare.

When complainant in this cause attempted to separate the toll bridge from the railway part in as much as toll bridges are taxable in Alabama by the county assessors (Code of 1886, Sects. 3911 and 3976) an effort was made for the first time by tax officers, as shown by the case from the 5th circuit, to tax this toll bridge, but complainant has so far successfully resisted this effort on the ground that the toll bridge was only a very small incidental feature of the railroad bridge. However this may be, this court has decided that what property is

worth for income and sale, especially in a State which requires it to be given in at its real value, it is also worth for purposes of taxation. And the evidence is clear and undisputed in this case that this property, which the auditor says is worth $355,000.00, is given in at less than $3,750.00. It is suggested that such wide departures in valuations in statements, requiring an oath to support them, will cause this court to reject the evidence of the witnesses Plant and Pegram wherever there is any reliable source of information from which to derive the truth.

The real value of the toll bridge may be found in the Record. It appears from the table at the head of page 156 and from the contract between the L. & N. Railroad and the M. & C. (page 175) third section, that the value of the foot bridge was assessed at $26,278.62. The railroad bridge at $92,093.52. Total, $118,372.14. Now then at this time and place there was a toll bridge capable of doing all the work of a toll bridge, whose value was fixed by engineers of both companies at $26,278.62. In order to make the valuation $51,083.34, the assumed value used in the ingenious tables of the Auditor in this case, there was an arbitrary addition of improvements to the actual value of $24,804.72. What were these improvements for? Clearly and solely to construct a railroad bridge capable of bearing the strain of two of the largest known locomotives coupled together, followed by a moving load of three thousand pounds to the foot. In all these improvements or in the new construction of the bridge there was added only as much more as was

sufficient to sustain an additional load of one thousand pounds for the highway. In other words the bridge was constructed to all intents and purposes regardless of the highway part. The railroad bridge was constructed and it included as an incidental feature a highway where the receipts from toll would probably pay the operating expenses of the bridge and whose toll keepers could act as watchmen and whose facilities would aid in the business development of a section whose resources and business was to a large extent tributary to this corporation.

Insisting that the best evidence in this case is the evidence of the engineers of the two corporations which shows that the value of the toll bridge was about $25,000.00, we go to the question of what the expenses of its operation are,—and here we are involved in the same confusion from the conflicting statements of the complainant and his witnesses that we have suffered about the value of the bridge. The tables on page 23 show that the total expenses of the operation of the bridge were, for 1892 and 1893, $1,771.22; for 1893–4, $1,723.19; for 1894–5, $1,482.68.

The witness Pegram testifies (table, page 89) that the expenses of operating the toll bridge for a year at Florence was $1,262.50.

The table of the Auditor, on page 160, has increased these expenses for the toll bridge for the years 1893–4 to $2,299.16; 1894–5, $2,219.90; 1895–6, $2,268.63. He cleverly manages to make a small net loss if the earnings were calculated at the proposed rate for each of these years, although

a similar table made a part of the bill on page 23 shows that there will be small net earnings for each of said years. An examination of the figures made by the Auditor will show that he arrives at these results partly by ignoring that section of the contract between the L. & N. and the M. & C., which requires the former company to bear a proportion of the operating expenses of the bridge, and also by adding an item of about five hundred dollars on account of general supervision and taxes, which should not be included at all in the operating expenses of the bridge. So far as the taxes are concerned, the entire railway and thoroughfare pays less than forty dollars per year, as shown by the testimony before mentioned. So far as the general supervision is concerned, the item of $204,971.23, it is not shown of what it was composed. What salaries, what improvements, where made and on the authority of Chicago, &c., Ry. Co. v. Wellman, 143 U. S. 345, it ought not to be considered in this case. The facts with reference to the earnings and operation are best shown by the annexed tables, which include every possible item of expenses as shown in the testimony in this cause. In the tables we have made the income and expenses for the years since the adoption of the act are taken. The act of the legislature of course is not and can not be retroactive. It refers only to time which shall take place after the passage of the act.

The following tables are submitted in lieu of the Auditor's tables, Nos. 216, 17 and 18, pages 160–1 and 2. The Audit[illegible]'s recklessness in adding to the expenses of the r[illegible]way, so as to show a net loss,

is shown by his making the footway proportion of the expenses 22.2% instead of 21.6% as is clearly required by section 6 of the contract (p. 176). Is it possible he really made such an error against his company on his books? He fails also to charge one-half the salary of the toll keepers to the railroad portion of the bridge, and Pegram admits in his sworn statement (p. 89) that one of the toll keepers at least is also a watchman. It is believed that both of them are. Although, for the sake of argument, we include in the following table the item of the General Supervision, we insist it ought to be stricken out:

EXPENSES—OPERATING, ETC.

1893-94. (No. 216.)

216 should be—			
Roadmaster	$1,650 00		
Supt. Bridges, etc	1,201 50		
292 miles	$2,851 50	Bridge proper 2,614 ft.	$ 4 49
Supervisor tank 100 miles	$990.00	Bridge proper 2.614 ft.	4 90
Engineer for draw			513 00
Oil, waste, etc			31 52
			$553 91
Footway proportion 21.6			$ 119 64
½ salary day toll keeper (watchman), see L. & N., cont.			256 50
½ " night " " " " " "			256 50
			$ 632 64
Renewals and paintings.			
Flooring footway be removed every 5 years.			
100,000 feet lumber @ $12.00	$1,200 00		
Labor, nails, etc	430 00		
1-5 off	$1,630 00	—for 1 year	326 00

Painting every 3 years, 21.6%.
Chargeable to footway cost, $1,500.00.
1 year $500.00 x 21.6%..... 108 00

$1,096 84

Gen. supervision, taxes, etc., based upon earnings—
Total general expenses.....$ 204,971 23
Gross earnings, entire line.... 1,274,817 78
Gross earnings, footway..... 3,113 71 or 244%.
244%. of $204,971.23..... 550 13

$1,616 77

EXPENSES—OPERATING, Etc.

1894-95. (No. 217.)

Roadmaster.....$1,620 00
Supt. Bridges and Bldg.... 1,242 00

292 miles track.....$2,862 00 Bridge...$ 4 85
Supervisor track, 100 miles. 970 00 " ... 4 81
Engineer for draw..... 486 00
Oil, waste, coal, etc..... 22 63

$518 29

Footway proportion, 21.6%. of $518.29.....$ 111 95
½ salary of day toll keeper (watchman), see L. & N. cont. 243 00
½ " " night " " " " " " 243 00

$ 597 95

Renewals and painting.
Flooring footway to be removed every 5 years.
100,000 feet lumber @ $12.00.....$1,200 00
Labor, nails, etc..... 430 00

1-5 (1 year).....$1,630 00— 326 00
Painting necessary every 3 years.
21.6%. chargeable to footway.
Cost $1,500.00 = 1 year (⅓) $500.00 x 21.6%..... 108 00
Total general ~~earnings~~.....$ 154,351 95
Gross earnings, entire line..... 1,202,273 58
Gross earnings, foot bridge..... 3,458 52 or 288%.— 444 53

$1,476 48

EXPENSES—OPERATING, Etc.

1895-96.

Roadmaster	$1,620 00		
Supt. bridges and buildings	1,242 00		
292 miles track: Bridge part of	$2,862 00—	$ 4 85	
Supervisor track, 100 mile " "	970 00	4 81	
Engineer for draw		486 00	
Oil, waste, lamps, coal, etc		19 26	
		$ 514 92	
Footway proportion 21.6%. of $514.92			$ 111 22
½ salary day toll keeper (watchman), see L. & N. cont.			243 00
½ " night " " " " " "			243 00
			$ 597 22
Renewal and painting.			
Flooring, footway to be renewed every 5 years.			
100,000 feet lumber @ $12.00	$1,200 00		
Labor, nails, etc	430 00		
1-5 (1 year) of	$1,630 00—		326 00
Painting necessary every 3 years.			
21.6%. chargeable to footway.			
Cost, $1,500 00 = 1 year ⅕ $500.00@21.6%			108 00
General supervision, taxes, etc., based on earnings—			
Total general expenses	$ 231,808 27		
Gross earnings, entire line	1,348,538 31		
Gross earnings, foot bridge	4,414 54 or 328%		
328%. of $231,808.27			551 70
			$1,582 92

Table No. 215 on page 160 should be as follows:

GROSS EARNINGS, EXPENSES AND NET EARNINGS OF THE FLORENCE FOOT BRIDGE AT PRESENT, AND PRESCRIBED RATE OF TOLL.

	1894-5.	1895-6.	1896-7.	
			Pegram's	Depo.
Gross earnings	$3,458 52	$4,414 34	$4,500 70	p. 180
Expenses, (see table above)	1,476 48	1,582 92	1,582 92	same as '95-6
	$1,982 04	$2,831 42	$2,917 78	
Interest of value of Toll Bridge, p. 158, t. p. 26,278.62 @ 6%	1,576 71	1,576 71	1,576 71	
Gain	$ 405 33	$1,254 71	$1,341 07	
Earnings at rate of toll proposed—				
	$2,075 11	$2,648 72	$2,700 42	
Add 20% for increased travel	415 02	529 74	540 08	
	$2,490 13	$3,178 46	$3,240 50	
Expenses as shown in former tables	1,476 48	1,582 92	1,582 92	(same as in 95-6)
Gain	$ 1,013 65	$1,595 54	$1,657 58	
	nearly 4% on 26,278.62	6%.	6%.	
Or stated with the item of expenses of general supervision left out:				
Gross earnings	$2,490 13	$3,178 46	$3,240 50	
Expense item of gen'l exp. out	931 95	1,031 22	1,031 22	
Gain	$1,558 18	$2,147 24	$2,209 28	
	or nearly 6% on $26,278.62	8%.	8%.	

There is another most important proposition in this case. Complainants may actually make more money by the prescribed than by the present rate of toll. Not only will the persons who use the toll

bridge now use it oftener, but those who have heretofore suffered the inconvenience of waiting for the trains can afford to use their own conveyances at the reduced rate. Now, in the first place, if the railway is used, the L. & N. operates trains as well as the complainant, and now takes, say, half of the traffic. But complainants get the entire toll from the toll bridge. Again, the railway charge is 10 cents, between Florence and Sheffield, and 16 cents between Florence and Tuscumbia, (Pegram deposition, p. 87), and even less than 10 cents, we presume between Florence and South Florence, the distance being less. Except for foot passengers, who pay 5 cents each on the bridge, and persons on horseback who pay 8 cents, complainants will receive as much or more from persons using buggies, carriages and wagons on the bridge than if they went by rail. Each one-horse vehicle and driver must pay 15 cents—30 cents round trip. The rail rate for the single person would be 10 cents to Sheffield—20 cents for round trip,—16 cents to Tuscumbia—32 cents for round trip. For each two-horse vehicle and driver, 25 cents—50 cents for round trip; and in order to protect the company from imposition, for each additional person in any of these carriages 5 cents—10 cents for round trip. So that, as said above, except for foot passengers, complainant will get more than on the railway. But only 17 foot passengers go over each day (Pegram's deposition, p. 86)—total $1.70 a day, or about $600 a year. The remainder, the largest part nearly, if not quite $4,000 a year, evidently comes from persons who use horses or vehi-

cles. And so, it appears that if people quit the trains, as they will do, and use their vehicles on the bridge, especially when it is considered that the L. & N. gets part of the rail traffic, the receipts of complainant will not be lessened at all, but may be larger. So of the toll bridge rate for stock, sheep, etc. The rate on the toll bridge is higher than complainants' freight rates, which go down by competition every year, while the toll rate has suffered no such reduction.

The deprivation of property contended for by complainant means a future deprivation—that is, after the passage of the act. And if it can be shown that there is gradual increase in business while the operating expenses must necessarily remain the same, then the complainant has no case.

It should not be forgotten that a bridge is a structure which, unlike a steamboat or railroad train, is stationary and remains in its place, and costs comparatively very little to maintain and operate it. A steel bridge like this is not exposed to fire. Being open and heavy it can hardly be blown away. It can be maintained for a great number of years at a trifling expense.

Complainant, in his exigency, alleged as an element of expense that this bridge had frightened two horses and that suits were pending against him. The idea of horses being frightened at a bridge. They might as well run from a house or a mountain.

This case has been argued heretofore as if the principle contended for by the appellees in the Nebraska case was correct, viz: That the interest of

the corporation only was to be considered and that it must be allowed to pay all expenses, including a large and unexplained item of general expenses and also at least 6 per cent. upon the value of its propty. The court in the Nebraska case expressly and positively declined to go that far. It asserted that the rights of the public are not to be ignored and this right of the public was affirmed to be to use defendant's property upon the payment of such tolls as, in view of the nature and value of the services rendered by the company, are reasonable. Well, now, as to the nature and value of these services. The bridge, say the complainant in their tax case, is a railroad bridge with a thoroughfare as an incidental feature. The appellate court in the Fifth circuit calls it a "necessary railroad bridge." The complainant is bound to maintain it for his railway business, and what he gets out of it is just so much added to his gross earnings on the bridge. He is bound to keep his watchmen and servants employed to take toll. He is bound to paint the bridge and keep up the substructure and superstructure except only the floor of the roadway, which only costs $326 per year.

It is alleged in the answer that the high tolls are excessive, extortionate and unjust as compared with the charges for like services in other localities. That they prohibit commercial and social intercourse between the towns of Tuscumbia, Sheffield and South Florence, and the city of Florence, and between the counties of Colbert and Lauderdale, the witness Conner, a man of high character, testifies that this is true (page 127), but it only needs

to set out again the rates of toll over the Florence bridge, viz: That 10¢ is charged for each horse or for each cow or for each person, child as well as adult. That one man and horse must pay 20¢, the round trip 40¢. That one-horse buggy must pay 30¢, round trip 60¢. That a two-horse carriage or buggy must pay one dollar for the round trip, and a two-horse wagon must pay $1.20 for the round trip to show that the present rates are unreasonable.

It is not shown that there are any street cars passing over this bridge, nothing except railway trains which on account of the expenses of running them and the fact that they go at stated intervals long apart makes them absolutely useless for frequent intercourse over the bridge. Pegram, indeed, testifies that the trains run frequently, but Ewing, the general agent of the L. & N. Railroad Company (page 140), testifies that on the L. & N. solid passenger trains run daily, and such is the fact, in reference both to the L. & N. and M. & C. We could suppose a case where the trains on both these roads leave Florence at or about one o'clock daily and return between two and four p. m., there being no other train in the morning and no more in the afternoon, and none at night except one leaving Florence at midnight and returning from Tuscumbia at four o'clock in the morning. That this is the fact as shown by all the printed schedules, does not detract from the force of the suppositious case I have made nor add anything to the convenience of the public in passing over this bridge.

An important principle was decided in the Covington and Cincinnati Turnpike case, 164 U. S., which is directly in point here. In that case the corporation set up the fact that the Cincinnati Southern road and the L. & N. road had built parallel lines with the turnpike and established stations on the turnpike and near to it which took away from the business of the turnpike. Now, suppose, which is not the case, that the trains on the L. & N. and M. & C. roads, instead of running daily, run hourly, and charged only three cents per mile, and accommodated nearly all the people, so that nearly all of them found it convenient to use the railroad trains, would this have justified the complainant in charging those persons who residing on one side of the river and having business on the other are compelled to cross on foot or by horse, or vehicle, in charging them the present high tariff. Because most of the freight from the factories which could go in car load lots was hauled over the railway, would that justify complainant in charging a man who crosses the bridge with a two-horse wagon with a load of melons or a load of corn $1.20 for the round trip when he could only sell the entire wagon load for two or three dollars? If a family of four school children pass daily over the bridge, the trains not running so that they could get to school in time, as is the case, and the station being a mile from the school house, as is also the case, would that justify the complainant in charging thirty-two cents a day for these children to cross his bridge? And is it not clear that if the rate were reduced, more people would use the

bridge? See how close these towns and these peoples are situated together. Note the manufactories on both sides of the river. Note that it is impossible for trains, even suburban trains in the large cities, to run frequently enough to accommodate the interests of people who live just across the river from each other.

It is perfectly clear that the business, passenger and freight has gone to the top of the bridge—to the railway part, but it is insisted that the people who do use this bridge shall be protected from extortionate rates. Pegram expressly declares, page 87, that there has been a decrease in the receipts of the toll bridge, because he says the L. & N. and M. & C. both run trains and charge so little for transportation.

We presume to call the attention of the Court briefly to the difference in the facts in this case and those recently decided by this Court.

In the Nebraska case, 169 U. S., the Court found as a matter of fact that if the prescribed rates were put into effect, which applied to the entire local business of the companies, that nearly all of them would transport this business at an actual loss, and that in one or two cases only, the net receipts would have been inconsiderable, too small to affect the general condition.

In the Covington turnpike case it was admitted that the act, if carried into effect, would not only reduce the receipts below the operating expenses, but would make it impossible for the company to maintain its road in a fit condition for the use of the public.

In the Texas case, Reagan v. Farmers' Loan and Trust Co., the cost of the railroad property was $40,000,000.00. It had $15,000,000.00 of bonds and $10,000,000.00 of stock, and the Court found that the proscribed rates would so diminish the earnings that they would not pay the operating expenses and interest on one-half of the bonded indebtedness. That is, to say property which cost $40,000,000.00, worth at least $25,000,000.00, there would be no return upon anything except upon $7,500,000 of this amount.

Now, in this case, we have earnings which have constantly increased. In 1894, $3,458.52; in 1895, $4,414.54 (see page 160); in 1896, $4,570 (see page 180).

On the railway part, cars in 1894, 10,232; in 1895, 11,471; in 1896, 21,834. See page 159.

In this case if the gross receipts from all parts of the bridge are added together and the gross expenses taken therefrom, even on the statement made by the servants of the company, a handsome return remains. But if the bridge is given credit for the business passing over it according to its real value in comparison to the value of the other portions of the property, then indeed the earnings will not only pay the operating expenses, but pay a profit upon a capitalization that would represent twice the value and cost of the bridge.

There is another phase on this question which ought to be presented. If complainant had shown, as he has failed to do, that there was not any actual return above operating expenses from the bridge, still

it must be considered that this bridge is the way by which this railroad corporation penetrates into the rich and flourishing city and county and territory north of the river and derives traffic therefrom to be carried over many miles of their railway and in this way to add to the gross receipt of the entire line.

Complainant does not introduce his freight agent at Florence to show to this court the monthly receipts of the company at that important station. Inasmuch as he has failed to do so, for that would be an important inquiry, the guess is ventured here by counsel that these receipts are not less than $1,500.00 per month, or $18,000.00 per year. Without the bridge no part of this could be added to the revenue of the company, and it seems to us that this is a portion of the earnings involved in this case and shows at least that complainant has utterly failed to bring into the court such evidence as will enable this court to interfere and to declare this act of the legislature unconstitutional.

This case should be dismissed:

(1.) Because it is a suit against the State of Alabama.

(2.) Because there are no proper or real parties defendant.

(3.) Because it attempts to restrain the discretionary duties of executive officers of the State.

(4.) Because it prays the court to establish and execute a void and illegal contract.

(5.) Because the prescribed rates are just and reasonable.

(6.) Because there is no equity in the bill of complaint.

Respectfully submitted,

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